

any other auction participant that has been so engaged. The courts have uniformly rejected the sort of bald assertions made here by Petitioners.<sup>63/</sup> In point of fact, the extent of bidding activity for the A and B block licenses, and the winning amounts paid for those licenses, strongly tend to place in doubt any claim of collusion. As noted above, the winning bids totaled over \$7 billion, a sum hardly consistent with a rigged auction. Instead, the A/B block auction reflected intense bidding by 30 participants<sup>64/</sup>, taking over three months and 111 rounds to complete.<sup>65/</sup> Moreover, winning bids were considerably higher than expected. Prior to the start of the auction, the Commission estimated the value of broadband PCS spectrum at \$10.50 per pop.<sup>66/</sup> The actual winning bids, however, averaged \$15.29 per pop, exceeding the Commission's expectations by 50%.<sup>67/</sup>

It is noteworthy that the Antitrust Division of the Department of Justice had been fully advised by the NAACP of Petitioners' allegations of anticompetitive behavior in the A and B

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<sup>63/</sup> See, e.g., Blanton Enterprises, Inc. v. Burger King Corp., 680 F. Supp (D.S.C. 1988) ("[T]here is a distinction to be drawn between reasonable inferences and mere speculation. 'Plaintiff's conclusions or speculation as to the existence of a conspiracy, without more, is not sufficient to establish a [violation of the antitrust laws].'" (quoting Terry's Floor Fashions v. Burlington Industries, 568 F. Supp. 205, 210 (E.D.N.C. 1983))).

<sup>64/</sup> Public Notice, FCC's First Broadband PCS Auction Opens First Round, released December 5, 1994.

<sup>65/</sup> Public Notice, Round One Hundred Eleven of FCC's Broadband PCS Auction Closes, released March 13, 1995.

<sup>66/</sup> Second Report and Order, PP Docket 93-253, 9 FCC Rcd 2348, 2379 (1994).

<sup>67/</sup> Telecommunications/Cellular: Broadband PCS MTA Auctions in a Nutshell, Merrill Lynch Global Securities Research and Economics Group, March 15, 1995, p. 2.

block auctions months before licenses were ever granted.<sup>68/</sup> In response, the Department informed the NAACP that the

Antitrust Division has been closely monitoring the progress of the PCS spectrum auction. We consider it to be a very high priority to ensure that there is vigorous competition in the auction itself, and that the allocation of spectrum rights will result in an industry structure conducive to vigorous competition to serve the customers of wireless communications services.<sup>69/</sup>

The Department added that it was interested in obtaining any additional information in the possession of the NAACP or its members suggesting the possibility of anticompetitive conduct in conjunction with the auction.<sup>70/</sup> Significantly, no additional information appears to have been provided to the Department by the NAACP or any of the other Petitioners. Moreover, the Department, which was well aware of the allegations made by the NAACP, did not object to the grant of the A/B block licenses in any comments filed with the Commission.

It is also material that Petitioners have not alleged any violation of the Commission's anticollusion rules, which were designed to prevent the sort of collusive behavior asserted by Petitioners.<sup>71/</sup> The Commission's rules are premised on the principle of full disclosure, and

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<sup>68/</sup> See Letter dated February 13, 1995, from Wade Henderson, Director NAACP Washington Bureau, to the Honorable Janet Reno. The letter sets forth in substance the same claims of collusion made before the Commission.

<sup>69/</sup> See Letter dated March 7, 1995, from Donald J. Russell, Chief, Telecommunications Task Force, Antitrust Division to Wade Henderson (attached hereto as Appendix 1).

<sup>70/</sup> Id.

<sup>71/</sup> See 47 C.F.R. § 1.2105. See also Fourth MO&O at 6867 ("our rules prohibiting collusion serve the objectives of the Budget Act by preventing applicants, especially the largest companies, from entering into agreements to use bidding strategies that divide the market to the disadvantage of other bidders.").

no facts have been presented to show that all bidding arrangements were not fully disclosed.<sup>72/</sup>

Under these circumstances, Petitioners' unsupported allegations should be rejected.

#### **IV. PETITIONERS DO NOT MEET THE REQUIREMENTS FOR A STAY**

Finally, the Commission must deny the Application's stay request because Petitioners have not met the standards necessary for grant of such relief. To obtain the extraordinary remedy of a stay, Petitioners must demonstrate that: (1) it is likely they will prevail on the merits; (2) they will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors grant of a stay.<sup>73/</sup> Petitioners fail to meet these tests.

##### **A. Petitioners Are Not Likely to Succeed on the Merits**

For the reasons given above, it is apparent that Petitioners have not met their burden of proving that they are likely to succeed on the merits. Petitioners misread the Congressional directives of 309(j), fail to show how they have been harmed in any legally cognizable sense by

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<sup>72/</sup> See 47 C.F.R. § 1.2105.

<sup>73/</sup> See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

the prompt licensing of the and A and B block winners, and advance no support for their anticompetitive allegations.

#### **B. Petitioners Will Not Suffer Irreparable Harm**

Petitioners claim that they will suffer irreparable harm if a stay is not granted because the A and B block licensees will receive a headstart advantage. Petitioners, however, are unable to offer any factual support for this claim. In point of fact, the Commission carefully designed the sequencing of the broadband PCS auctions with the best interests of designated entities in mind. The Commission recognized, when it decided to award the C block licenses after the MTA licenses, that the A and B block winners would receive a headstart in licensing. The Commission determined, however, that the overriding public interest in the prompt introduction of a new service outweighed that concern. Though, regrettably, there have been delays to the C block auction, the balancing of public versus private interests has not changed. Moreover, the experiences of both the cellular and the long distance industries suggest that the competitive disadvantage that Petitioners fear may be overstated. Finally, the specific harms that Petitioners hypothesize will befall them -- loss of access to capital, base station cell sites, distributors and retailers and loss of market share -- are extremely speculative, and do not justify the extraordinary remedy of a stay.<sup>74/</sup>

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<sup>74/</sup> See, e.g. Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (1985) (to show irreparable harm, "the injury must be both certain and great; it must be actual and not theoretical").

### **C. The A/B Block Winners Would Suffer Considerable Harm**

By contrast, the winning bidders in the A and B block auction would suffer tremendous harm if prevented from going forward with the build-out of their systems and the provision of service to the public. They have collectively paid over \$7 billion dollars for their licenses and have invested considerable additional funds in the preliminary phases of building out their system. The delay associated with a stay would thus impose a direct economic penalty on Western and the other A and B block winners. Such a delay would also seriously jeopardize the ability of the licensees to raise the capital necessary to construct and commence the operation of their systems, by clouding the finality of their license grants. Typically, financing agreements in the wireless industry preclude funding or impose lending limits until such finality occurs. Thus, a stay would have a substantial impact on the licensees' financing capabilities. As Petitioners have themselves recognized,<sup>75/</sup> capital formation is critical to success in the wireless industry. The potential customers of A and B block licensees would also suffer harm from the delay in the provision of service and the deferral of competition in the wireless industry.

### **D. A Stay Would Not Be in the Public Interest**

Most significantly, Petitioners have failed to show that a stay of the A and B block licensing is in the public interest. Congress mandated that the Commission promote the

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<sup>75/</sup> Application at 5.

development and rapid deployment of PCS for the benefit of the public.<sup>76/</sup> As the Commission stated in the CommOne Order, the public interest in rapidly providing new sources of wireless services and competition outweighs any concern about the A and B block providers enjoying a headstart.

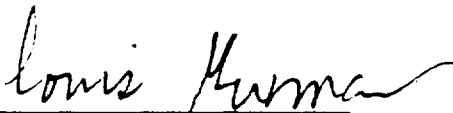
## V. CONCLUSION

For the foregoing reasons, Western respectfully requests that the Commission deny the Application for Review and Request for Stay.

Respectfully submitted,

WESTERN PCS CORPORATION

By:



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August 10, 1995

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<sup>76/</sup> See 47 U.S.C. § 309(j)(3)(A).

## **APPENDIX 1**



**Antitrust Division**

**Judiciary Center Building  
25 North Street, N.E.  
Washington, D.C. 20002**

**March 7, 1995**

**Mr. Wade Henderson  
Director  
National Association for the Advancement  
of Colored People  
Washington Bureau  
1025 Vermont Avenue, N.W., Suite 1120  
Washington, D.C. 20005**

**Dear Mr. Henderson:**

Thank you for your letter of February 13, 1995 to Janet Reno. We read with great interest your description of the changes that are now occurring in the communications industry, and of recent developments affecting minority participation in that industry, in particular in the developing market for personal communications services ("PCS"). Since the primary purpose of your letter was to request an antitrust investigation relating to the ongoing auction of spectrum rights for PCS, the Attorney General forwarded your letter to the Antitrust Division and asked us to respond to it.

The Antitrust Division has been closely monitoring the progress of the PCS spectrum auction. We consider it to be a very high priority to ensure that there is vigorous competition in the auction itself, and that the allocation of spectrum rights will result in an industry structure conducive to vigorous competition to serve the customers of wireless communications services. Accordingly, we would be very interested in obtaining any additional information that you or any members of your organization may have that suggests the possibility of anticompetitive conduct in conjunction with the auction. If you can provide any such information (or if you wish to discuss the types of information that would be helpful to us), please contact me at (202) 514-5621.



We very much appreciate your efforts to bring these matters to our attention, and your interest in the enforcement of the antitrust laws.

Sincerely,



Donald J. Russell

Chief

Telecommunications Task Force

CERTIFICATE OF SERVICE

I, Jamie C. Whitney, a secretary in the law offices of Gurman, Blask and Freedman, Chartered, do hereby certify that I have on this 10th day of August, 1995, had copies of the foregoing "OPPOSITION TO APPLICATION FOR REVIEW" mailed by U.S. first class mail, postage prepaid, to the following:

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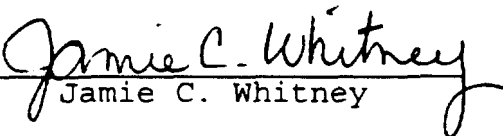
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